Filed 10/5/09 P. v. Millner CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. JAMES WILLIAM MILLNER, Defendant and Appellant.	C056979 (Super. Ct. No. 06F163)

A jury convicted defendant James William Millner of second degree murder and attempted murder, and found he personally used and intentionally discharged a firearm, and caused great bodily injury during the attempted murder. (Pen. Code, §§ 187, 664, 12022.5, subd. (a), 12022.7, subd. (a), 12022.53, subd. (d).) The trial court sentenced him to prison for 65 years to life, and he timely appealed.

Defendant contends the trial court misinstructed on malice, the prosecutor committed misconduct in argument, and the trial court imposed an unauthorized sentence on count 2, attempted

murder. We accept the People's concession that the cause must be remanded for resentencing on count 2, and otherwise affirm.

FACTS

Early one morning in January 2006, defendant shot and killed his wife, Ila Lavine Millner, and shot his teenage son, A. M., who had been trying to protect his mother. Defendant's older son, K., was at the house that night, as was B. G., A. M.'s friend, who was staying over.

A. M. was 16 years old at the time. He testified his parents argued at times and he had seen defendant hit his mother. Defendant had a drinking problem and sometimes got angry when drunk. Defendant was also on medication that gave him mood swings, and sometimes when he combined that with drinking, A. M. thought defendant hallucinated, and defendant would accuse A. M.'s mother of having affairs. Defendant had accused A. M.'s mother of infidelity "quite a few times," with four or five people, and had accused two of his brothers (A. M.'s uncles) with raping her. Beginning in November 2005, defendant accused her of having an affair with "a Mexican man[,]" which was around the time she reported to A. M. that defendant had hit her on the head with a rock.

A. M. testified that on the night of the killing, his parents were arguing about defendant's drinking and her alleged affairs. A. M. and B. G. went to A. M.'s room. At about 12:30 a.m., A. M. heard a scream, and after a second scream he went to his parents' room to see if his mother needed help. He saw defendant straddled on top of his mother with his left hand

over her mouth as she lay on her back. A. M. put defendant in a headlock to get him off of his mother, saw that defendant had a gun in his right hand, and began hitting defendant in the head. Defendant knocked A. M. off, shot A. M.'s mother four or five times, then turned, put the gun to A. M.'s stomach, and shot A. M. A. M. then felt defendant put the gun to his back, but did not hear a gunshot. As A. M. left the house, he heard his father say that he (A. M.) got shot "and then mom drew a gun on me [defendant]." A. M. and B. G. drove off, and defendant followed them, until they were pulled over about 15 miles from home.

B. G., who was 17 years old at the time, testified he had heard defendant and A. M.'s mother arguing often. He had seen it turn physical on an occasion not long before the shooting, and he and A. M. had to physically separate the couple. After the boys heard a second scream that night, B. G. told A. M. to go check. B. G. heard six or seven gunshots, then A. M. came running and the boys ran outside. Defendant came out and said "Lavine" was hurt, so B. G. went into the house and saw the victim, who was dead; when B. G. heard defendant coming back in, he left the house. At some point B. G. also heard defendant say that A. M. needed to go to the hospital. B. G. heard defendant say "'[A. M.], look what you made me do,' or '[A. M.], look what I've done.'" The boys left in A. M.'s truck, with A. M. driving. They stopped not far from the house, but defendant arrived and said something, so they drove off and later were stopped by a deputy sheriff.

K.'s testimony about his parents' arguments matched A. M.'s testimony. K. testified his parents argued a lot, "always about money" and a few times about affairs. K. admitted he told the police that within a few months of the shooting, he heard defendant say he saw the victim having sex with a Mexican on a porch swing, but testified his father did not say that, his mother had told him of this accusation. The morning of the shooting, K. heard some pounding noises, then his father told him to take A. M. to the hospital because A. M. had been shot. While K. called 911, he heard his father in the bedroom saying "'please, no, wake up.'"

Redding Police Officer Steve Tumelson received a radio dispatch at about 1:00 a.m. that morning, from K., who reported that defendant had shot K.'s mother and possibly K.'s brother A. M. Officer Tumelson went to defendant's house in Oak Run and found the victim in the master bedroom, dead from multiple gunshot wounds. A pistol was on the floor, with a shell casing "jammed in the action of the slide."

Shasta County Sheriff's Deputy Mike Tumelson (Officer Tumelson's brother), received a radio dispatch that defendant was engaged in a car chase and was going after his son. Deputy Tumelson was able to stop both vehicles, which were about 15 miles from defendant's house. A. M., who had been shot through the abdomen near his navel and out his back, said that defendant shot him. Defendant said that it was an accident. Defendant was upset because "he didn't feel that A. M. was getting medical care quick enough." Defendant also said "'someone had died

tonight.'" Defendant was taken to the hospital because he had an injury to his forehead and he said "he was hit with either the front sight or the front portion of the slide of a handgun while he was trying to take it away from his wife." Defendant said he "had been arguing with his wife regarding an extramarital affair that she had had." Defendant had been drinking, but was not drunk. He repeatedly asked about A. M.'s condition, but first asked about Lavine's condition about 30 minutes later, at the hospital.

Technical evidence was introduced through forensic witnesses or by stipulation. The victim had no alcohol or drugs in her blood. Defendant's blood-alcohol level at around 5:30 a.m., was .11 percent, and may have been about .21 percent at the time of the shooting. He also had methadone in his system, a powerful pain reliever also used to treat heroin addiction. It would have a calming effect like morphine or valium. The label on defendant's prescription bottle indicated he took it for pain relief.

Blood found on the gun matched the victim's blood, and a hair found on the gun came from defendant's head, not from his eyebrow.

The gun was found jammed, "The expended cartridge had not fully ejected . . . and the slide was back basically rendering it in an inoperable condition[.]" Seven casings, including the one jamming the gun, were found in the bedroom, indicating seven shots were fired. The victim was shot five times, one shot went into the wall and A. M. was shot once, matching the seven empty

casings found. The bullets were fired in a relatively tight group into the victim. One bullet went through the victim's right cheek and cut her left jugular vein. One bullet went through her left lung and out her left armpit. One bullet went through her right lung, perforated her heart, and lodged in her spine. One bullet first went through her arm, fracturing the radius and ulna, then hit a rib, and then went through her heart. One bullet entered below her rib cage, perforated her liver, and went through her spleen.

Defendant's facial injury was consistent with being struck by a pistol. Defendant told the emergency room doctor that he had been struck in the eyebrow with a gun barrel, but the injury could also have been caused by a fist. At the hospital, defendant was "somewhat cheerful," at one point laughing and making a joke about being allergic to Novocaine, but he was otherwise "Remarkably calm."

The murder weapon, a Browning Hi-Power nine-millimeter pistol, was in good working order, with a six- to six and one-half-pound trigger pull, which is normal for that type of gun. The jurors were allowed to pull the trigger for themselves, under careful supervision. Given the gun's recoil, a person would have to consciously re-aim the gun to keep a tight pattern of shots.

Shasta County Sheriff's Sergeant Lisa Shearman recorded an interview with defendant beginning around 5:00 a.m. that morning, and he appeared sober. In part, defendant said he and his wife were arguing about her alleged affairs when she pulled

a gun and struck him in the temple. They began to struggle and "the gun just started going off[;]" it was an accident. But Sergeant Shearman believed this story of wild shots during a struggle was inconsistent with the five compact shots into the victim, one shot into A. M., and only one shot into the wall.

Several days later, at the jail, defendant asked to speak with Sergeant Shearman again. Defendant said no shots were fired until A. M. grabbed him, and that it was an accident that defendant shot his wife.

Sergeant Shearman monitored a recorded jail visit between defendant and his brother Gary in February 2006. Defendant told his brother he argued with the victim that night.

A defense psychologist, Kent Caruso, testified defendant was impulsive, the Millners had a "volatile, explosive relationship" and it was just a matter of time for one or the other or both to be killed: The relationship was "a disaster waiting to happen[.]"

Defendant did not testify.

DISCUSSION

I.

Defendant contends the trial court misinstructed on malice, leaving "the jury with no choice but to convict appellant of second degree murder even if they found the elements of legal provocation had been met." "No instruction told the jury that heat of passion was sufficient to negate malice." In particular, he claims the trial court should have instructed along the lines of CALJIC No. 8.50, which in part states that

where provocation is shown, "even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent."

The trial court gave the now-standard CALCRIM instructions that *intentionally* changed the way malice is presented to the jury, because the CALJIC instructions were confusing for a jury to understand and apply. In *People v. Genovese* (2008) 168 Cal.App.4th 817 (*Genovese*), decided after defendant's opening brief was filed, we upheld these new pattern instructions. Accordingly, we reject defendant's claim of instructional error.

Here, the trial court gave slightly modified versions of CALCRIM Nos. 520 (murder with malice aforethought) and 521 (murder: degrees), requiring the jury to find defendant acted with malice, defining express and implied malice, and distinguishing first and second degree murder.

The trial court also gave CALCRIM No. 522, as follows: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also consider the provocation in deciding whether the defendant committed murder or manslaughter."

Most importantly for purposes of this appeal, the trial court gave CALCRIM No. 570, defining voluntary manslaughter, as follows (with transcription errors corrected in brackets):

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. The defendant killed someone because of a sudden quarrel or in the heat of passion if one, the defendant was provoked. Two, as a result of the provocation the defendant acted [rashly] and under the influence of intense emotion that obscured his reasoning and judgment; and three, the provocation would have caused a person of average disposition to act [rashly] and without due deliberation, that is, from passion rather than from judgment.

"Heat of passion does not require anger, rage, or any specific [emotion]. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

"In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. Although no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. It is not enough that the defendant simply was provoked.

"The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation and knowing the same facts. If

enough time pas[sed] between the provocation and the killing for a person of average disposition to quote, unquote cool off and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a sudden quarrel or in the heat of passion. If the People have not met this burden . . . you must find the defendant not guilty of murder."

The *Genovese* case guides our analysis here; it largely involved imperfect defense of another, which, like provocation, may eliminate malice and reduce a murder to voluntary manslaughter. There, we held that it did not matter that CALCRIM instructions do not *tell the jury* that imperfect defense of another eliminates malice: "[T]he jury was told, in a series of instructions, what different kinds of acts and situations would reduce the crime from murder to voluntary manslaughter. . . . 'Malice is another word of multiple meanings in criminal law . . . .' [Citation.] The definition of malice may be interesting to lawyers and judges and law professors, but it does not aid the task of lay jurors to inform them that, when the defendant acts in an honest but unreasonable belief in the need to defend another, he is acting without malice. Consequently, the CALCRIM instructions are not erroneous in their failure to tell the jury the role that malice (or lack of malice) plays in reducing murder to voluntary manslaughter." (*Genovese*, *supra*, 168 Cal.App.4th at pp. 830-831.)

We then addressed Genovese's claim more specifically, both as to imperfect defense of another *and* heat of passion:

"[Genovese] argues the instructions did not inform the jurors they could find him guilty of voluntary manslaughter if they found that he, while acting in imperfect defense of another (or sudden quarrel or heat of passion), killed either intentionally or unintentionally with conscious disregard for human life.

"Either an intent to kill or a conscious disregard for life is an essential requirement of voluntary manslaughter in this scenario. [Citations.]

"[Genovese] argues the trial court should have expressly instructed the jury that intent to kill or conscious disregard for life is an essential element of voluntary manslaughter, in accordance with [prior cases], and the failure to do so left the jurors with no way to apply [Genovese]'s proffered defense to the elements of express or implied malice to ascertain whether these elements had been proven beyond a reasonable doubt. We disagree.

"Thus, although the jury was not expressly instructed in that manner, the jury *was* instructed, 'A killing *that would otherwise be murder* is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect defense of another.' (Italics added.) Similarly, the jury was instructed, 'A killing *that would otherwise be murder* is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.'

"The killing could not 'otherwise be murder' unless the jury found defendant intended to kill the victim or acted with conscious disregard for human life, and the jury was so informed in the instruction defining murder (i.e., that to prove murder, the prosecution must prove defendant acted with malice aforethought, and there are two kinds of malice aforethought-express, which requires intent to kill, and implied, which requires conscious disregard for human life).

"Thus, the instructions did let the jury know that a killing in imperfect self-defense (or heat of passion, etc.), whether intentional or in conscious disregard of life, is voluntary manslaughter.

"[Genovese] argues the language, 'killing that would otherwise be murder,' was faulty for failing to inform the jury that voluntary manslaughter could be found despite the existence of an intent to kill or conscious disregard for life. This argument is not well taken. [Genovese] says intent to kill or conscious disregard for life used to be expressly stated as an essential element of voluntary manslaughter in former CALJIC No. 8.40, which defined voluntary manslaughter and said that every person who unlawfully kills another human being without malice aforethought but either with an intent to kill, or with conscious disregard for human life, was guilty of voluntary manslaughter. Language similar to former CALJIC No. 8.40 now appears in CALCRIM No. 572, which defines voluntary manslaughter when murder is not charged. (CALCRIM No. 572.) Here, voluntary manslaughter was a lesser offense of murder. [Genovese] argues

that, since no instruction tracking former CALJIC No. 8.40 was given in this case, once the jury determined that express or implied malice was present in [Genovese]'s case, they were given no instructions telling them that *even if* they found this to be true, they could still find [Genovese] guilty of voluntary manslaughter if they believed he acted in heat of passion or in reasonable/unreasonable defense of [another]. But [Genovese]'s argument is defeated by the plain language of the instructions as given to the jury, that '[a] killing that would otherwise be murder is reduced to voluntary manslaughter' if [Genovese] acted in imperfect defense of another or sudden quarrel or heat of passion." (*Genovese*, *supra*, 168 Cal.App.4th at pp. 831-832.)

We adhere to our view that the CALCRIM instructions properly convey to the jury what it must find in order to convict a defendant of murder, instead of voluntary manslaughter, when heat of passion is raised in an effort to defeat malice. The CALCRIM committee made it easier for juries to understand such cases, without in any way reducing the People's burden or misstating what the jury had to do to determine the level of defendant's culpability. Because the trial court gave correct and adequate CALCRIM instructions in this case, we reject defendant's claim of instructional error.

II.

Defendant contends the prosecutor made a number of misstatements about the law during closing argument, to defendant's prejudice.

These claims are forfeited because defendant did not interpose any objections at trial. "To preserve a claim of prosecutorial misconduct, a defendant must make a timely and specific objection. Failure to do so forfeits the issue for appeal." (*People v. Wilson* (2008) 44 Cal.4th 758, 800.)

Defendant claims he can avoid forfeiture because the trial court failed to intervene as purportedly required by Penal Code section 1044. That statute partly states "It shall be the duty of the judge . . . to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." We agree with defendant that this statute is but a codification of the trial court's inherent duty to control the proceedings before it (see *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386-1388), but it "does not abolish or supersede the rules of trial objection or appellate waiver." (*People v. Arias* (1996) 13 Cal.4th 92, 159-160.) "'[B]ecause we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.'" (*People v. Medina* (1995) 11 Cal.4th 694, 727 [rejecting claim that section 1044 allows appellant to circumvent finding of forfeiture].)

Accordingly, defendant's claims of error based on prosecutorial misstatements of the law are forfeited.

Nor can defendant avoid forfeiture by accusing trial counsel of incompetence. We recently addressed this point:

"This has increasingly become the favored means by which appellate defense counsel's attempt to avoid any and all claims of forfeiture. In effect, if an issue was forfeited, then trial counsel's representation must have been deficient, and the issue must be considered anyway to determine if the ineffective assistance resulted in prejudice. However, that is not the applicable standard.

"'"[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof."' [Citation.]

"'[T]he mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel.' [Citation.] If, as here, the record fails to show why counsel failed to object, the claim of ineffective assistance must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or there can be no satisfactory explanation. [Citation.] 'A reviewing court will not second-guess trial counsel's reasonable tactical decisions.' [Citation.]

"In the present matter, after setting forth the basic standard for ineffective assistance, defendant's argument

consists of the following: 'Since there is a reasonable probability that verdicts more favorable to [defendant] would have resulted if [defendant]'s counsel had acted in a reasonably competent manner by objecting to the erroneous instructions, this court should consider the instructional arguments raised herein, and reverse . . . .'

"This argument does not even attempt to explain how counsel's failure to object fell below an objective standard of reasonableness or how the failure to object resulted in prejudice. We will not address a claim that defendant has failed to develop. [Citations.] In this instance, defendant's argument merely presumes counsel's failure to object fell below an objective standard of reasonableness and she was prejudiced thereby. Defendant also neglects to argue how there could be no satisfactory explanation for counsel's failure to object. This will not suffice." (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 466-467 (*Mitchell*).)

In this case, although the issue is not instructional error but rather the prosecutor's misstatements, appellate counsel provides a similarly inadequate explication of incompetence. He simply asserts that "There can be no satisfactory explanation for counsel's failure to object to the prosecution's legal misstatements. Correcting the errors could only have assisted his client in obtaining a voluntary manslaughter conviction." He also claims "Had counsel [objected], the court could have admonished the jury that the prosecutor had misstated the law

and ordered the jury to disregard that portion of the argument[.]"

But the trial court instructed the jury to follow the law as given by the trial court, and if "the attorney's comments on the law conflict with my instructions, you must follow my instructions." We presume the jury followed this instruction. (*People v. Stitely* (2005) 35 Cal.4th 514, 559.) We also observe that at the beginning of his argument, the prosecutor told the jury to follow the law as stated by the trial court. Therefore, the record shows a plausible tactical reason why defense counsel did not object to the claimed misstatements: No objection was necessary to ensure that the jury followed the law as given by the trial court, and nothing the prosecutor said impaired defense counsel from making correct legal statements, including about the relationship between provocation and malice, specifically, that provocation can reduce murder to manslaughter.

Nonetheless, because the Attorney General partly concedes that the prosecutor misstated the law, we briefly touch on defendant's forfeited claims, for completeness.

Appellate counsel cited some passages that were not purported statements of the law, but arguments to persuade the jury how the evidence fit within a legal definition, such as arguing defendant acted out of longstanding anger, that he had time to reflect and cool off, and that the number and accuracy of the shots showed that defendant was not acting out of heat of passion.

Additional passages appear to have been a response to part of Dr. Caruso's testimony. On cross-examination Dr. Caruso had testified as follows: "Q. [Y]ou agree heat of passion has to be a sudden, unexpected confrontation with this devastating provocation that would cause anybody to react in the same manner; is that correct? [¶] A. Take out the word 'anybody.' [¶] Q. Any normal, reasonable person. [¶] A. Yeah, any normal, reasonable person might behave, not predictably or necessarily would, but might behave in the same manner under the same circumstances."

The prosecutor argued that heat of passion "has to be unexpected, unanticipated provocation that is so great that any normal, reasonable person when faced with this provocation would also have killed[.]" "The only time that the law allows a reduction to a manslaughter is in extreme, unexpected, unanticipated provocation [such] that any normal person would also have killed under the same circumstances." He also argued that to find provocation the jurors would have to find they would have done the same thing as defendant.

But despite Dr. Caruso's testimony, provocation, as the concept is used in homicide cases, does not have to be *unexpected*, it can result from long-simmering anger from a well-understood cause, such as a spouse's infidelity, a classic form of provocation. (See *People v. Berry* (1976) 18 Cal.3d 509, 513-516 [wife taunted husband for two weeks about infidelity].) Nor does provocation require that the killer's *response* be

reasonable. (See *People v. Najera* (2006) 138 Cal.App.4th 212, 223-224 (*Najera*).)

The prosecutor also stated intent to kill was inconsistent with provocation: "You have now made a conscious decision. You are aware of what you are going to do. You are aware of the consequences. That's the difference between murder and heat of passion defense for manslaughter." But provocation may coexist with intent to kill; it precludes a murder conviction *despite* the intent to kill. (See *People v. Rios* (2000) 23 Cal.4th 450, 460-462; *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 823.) The two are compatible.

However, we are not persuaded that these or similar passages containing misstatements of the law were of the sort that would cause the jury to disregard the trial court's instruction to take the law from the trial court, not the attorneys. (*Najera*, *supra*, 138 Cal.App.4th at p. 224.) Accordingly, even if the contentions of error were not forfeited by the failure to object, they were harmless.

III.

The punishment for attempted murder is imprisonment in the state prison for five, seven or nine years, but when the People plead and prove a *willful, deliberate and premeditated* attempted murder, the punishment is life with the possibility of parole. (Pen. Code, § 664, subd. (a); see *People v. Seel* (2004) 34 Cal.4th 535, 540-541.) For count 2, attempted murder of A. M., the trial court imposed life with the possibility of parole.

Defendant contends, and the People concede, that because the People did not plead or prove that the attempted murder was willful, deliberate and premeditated, the trial court imposed an unauthorized sentence and the cause must be remanded for resentencing, so the trial court can choose a lawful sentence from among the three options provided by the Legislature. We agree and will remand for resentencing.

DISPOSITION

The cause is remanded with directions to the trial court to resentence defendant on count 2, in conformity with this opinion. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

RAYE, Acting P. J.

BUTZ, J.